

**SMALL WIRELESS FACILITY RIGHT-OF-WAY USE AGREEMENT**

This Right-of-Way Use Agreement ("Agreement") is made and entered into on \_\_\_\_\_, 20\_\_ by and between the Borough of Tinton Falls, a New Jersey municipal entity, having its municipal offices at 556 Tinton Avenue, Tinton Falls, NJ 07724 and New York SMSA Limited Partnership d/b/a Verizon Wireless ("Licensee"), having a mailing address at One Verizon Way, Mail Stop 4AW100, Basking Ridge, NJ 07920.

Throughout this Agreement Borough of Tinton Falls and Licensee each may be referred to as a "Party" and collectively may be referred to as the "Parties."

**WITNESSETH:**

**WHEREAS**, the Borough of Tinton Falls is a duly formed governmental entity, organized and existing in accordance with the laws of the State of New Jersey; and

**WHEREAS**, the Borough of Tinton Falls possesses and exercises control over various permanent rights-of-way that are, or are planned to be, utilized for streets, roads and highways, as depicted on the current Borough of Tinton Falls Tax Map and/or other maps and documents of public record; and

**WHEREAS**, various public utilities that are subject to the jurisdiction of the New Jersey Board of Public Utilities such as, by way of example and not by way of limitation, JCP&L and Verizon, have erected and maintain utility poles within the public rights-of-way in the Borough of Tinton Falls for use in connection with supplying and distributing electricity, telephone services, cable television, telecommunication services and/or other utilities pursuant to consent previously granted by Borough of Tinton Falls; and

**WHEREAS**, Licensee does not presently have the right to maintain utility poles in any municipal right-of-way within Borough of Tinton Falls or to otherwise use or occupy any municipal right-of-way within Borough of Tinton Falls for any of its Small Wireless Facilities, as hereinafter defined; and

**WHEREAS**, Licensee has petitioned the Borough of Tinton Falls for its consent to locate, place, attach, install, operate, control, maintain, upgrade and enhance its Small Wireless

Facilities in municipal rights-of-way as well as on utility poles and/or other facilities that are owned by third parties which already are located in municipal rights-of-way pursuant to municipally granted franchises or otherwise; and

**WHEREAS**, N.J.S.A. 48:3-18 provides that any person may enter into a written agreement with any other person owning utility poles erected under municipal consent in any street, highway or other public place for use by the former person and N.J.S.A. 48:3-19 requires that the former person obtain the consent of the Borough of Tinton Falls for use by the former person of the poles of another if the former person does not have the lawful right to maintain poles in such street, highway or public place; and

**WHEREAS**, as to those utility poles or structures that are owned by third parties and which are located in municipal rights-of-way pursuant to municipally granted franchises or otherwise, Licensee has provided Borough of Tinton Falls with evidence, consisting of written agreements, that it has obtained consent from those third parties to use the utility poles or structures that are owned by those third parties; and

**WHEREAS**, consent for use of any street, avenue, park, parkway, highway or other public place may be granted by ordinance and not otherwise; and

**WHEREAS**, the Borough of Tinton Falls Council has adopted Section 40-38.1 of the Borough Code, which authorizes the making and execution of this Agreement.

**WHEREAS**, the Borough of Tinton Falls has established the order of preference for Small Wireless Facility attachments as (1) Existing or approved concealment or smart pole; (2) Wood Pole Attachment when option (1) is shown not to be viable; or (3) New standalone pole where options (1) and (2) are shown not to be viable.

**NOW, THEREFORE**, for and in consideration of the covenants and obligations contained herein and for other good and valuable consideration, the receipt and sufficiency of which hereby is acknowledged, the Parties hereby agree as follows:

1. **Incorporation of Preamble.** All of the statements of the Preamble are repeated and are incorporated herein and are made apart hereof by this reference thereto as if set

forth at length.

2. **Definitions.** All definitions of words, terms and phrases that are set forth in the Communications Act of 1934, P.L. 73-416, as amended by various statutory enactments including, but not limited to, the Telecommunications Act of 1996 P.L. 104-104, are incorporated herein and are made apart hereof.

All definitions of words, terms and phrases that are set forth in the New Jersey Municipal Land Use Law, N.J.S.A. 40:550-1, et. seq., are incorporated herein and are made apart hereof.

In the event that a term, word or phrase is not defined in any of the aforementioned statutes and is not otherwise defined by this Agreement then that term, word or phrase shall have its common, ordinary meaning.

"County" means the County of Monmouth in the State of New Jersey.

"Borough" means the Borough of Tinton Falls in the State of New Jersey.

"Licensee" means New York SMSA d/b/a Verizon Wireless (name of Licensee).

"Public Right-of-Way" means the surface, the airspace above the surface and the area below the surface of any street, road, highway, lane, alley, boulevard or drive, including the sidewalk, shoulder and area for utilities owned by the Borough of Tinton Falls within an easement to the public or other easement owned by the Borough of Tinton Falls.

"Pole" means a wooden or metal pole that is used to support electrical wires, telephone wires, coaxial cables, fiber optic cables and the like.

3. **Grant of Consent.** In accordance with the provisions of N.J.S.A. 48:3-19, et. seq., and Borough of Tinton Falls Code Section 40-38.1, and subject to obtaining the

permission of the owner(s) of the affected Utility Poles, Borough of Tinton Falls hereby grants approval and consent to Licensee, its consultants, agents and contractors, to enter upon Public Rights-of-Way within the confines of the Borough of Tinton Falls for the purpose of owning, constructing, attaching, operating, maintaining, removing, reattaching, reinstalling, relocating and replacing its Small Wireless Facilities that more particularly are depicted and are described in "Section One: Definitions," made a part hereof, upon the Poles that are particularly identified in "Section One: Definitions," all of which Poles are located in Public Rights-of-Ways and all of which Poles are owned by third parties. Licensee represents that it has obtained consent from the owners of the Utility Poles to utilize those Poles for the aforementioned purposes. Licensee shall furnish the Borough of Tinton Falls with evidence of its Pole attachment agreement(s) made pursuant to N.J.S.A. 48:3-18 and/or N.J.S.A. 14:18-2.9, et seq. Further, the Borough of Tinton Falls hereby grants approval and consent to Licensee, its consultants, agents and contractors, to enter upon Public Rights-of-Way within the confines of the Borough of Tinton Falls for the purpose of constructing and owning, such new utility poles or new structures for the purposes attaching, operating, maintaining, removing, reattaching, reinstalling, relocating and replacing its Small Wireless Facilities that more particularly are depicted and are described in Section One: Definitions, made a part hereof. Nothing in this Agreement shall be construed as authorizing Licensee to own, construct, attach, operate, maintain, remove, reattach, reinstall, relocate and/or replace any Small Wireless Facility, Utility Pole or any other structure unless the Licensee first has obtained all permits and other approvals therefore, as required by all applicable laws and regulations. Nothing in this Agreement shall be construed as granting Licensee consent to utilize any rights-of-way over which Borough of Tinton Falls lacks authority to grant consent such as the State of New Jersey

rights-of-way. This Grant of Consent is a grant of consent generally to use the right of way but is not a grant of consent to place any specific facilities at any specific site.

4. **Term.** The term of this Agreement shall be fifteen (15) years, commencing on the date the Agreement is fully executed, unless sooner terminated by either accordance with the provisions of this Agreement. The term of this Agreement shall be extended mutual written agreement for up to four (4) successive terms of five (5) years each on the same terms and conditions as are set forth herein unless either parties transmits notice of its intent not to renew no later than sixty (60) days prior to the end of the term.

5. **Non-Exclusive License.** This Agreement is a non-exclusive license. It shall not be recorded. Any and all rights granted to Licensee under this Agreement shall be exercised at Licensee's sole cost and expense, shall be subject to the prior and continuing right of Borough of Tinton Falls to use any and all parts of its Public Rights- of-Way exclusively or concurrently with any other person or entity and further shall be subject to all deeds, easements, dedications, conditions, covenants, restrictions, encumbrances and claims of title of record which may affect the Public Rights-of-Way. Nothing in this Agreement shall be deemed to grant, convey, create or vest in Licensee a real property interest in any land, including any fee, leasehold interest or easement.

6. **Compliance with Laws; Required Permits; Utilities; Maintenance.**

(a) **Compliance with Laws.** Licensee shall comply with all applicable federal, state and Borough of Tinton Falls laws, administrative regulations, codes, zoning ordinances, ordinances, standards, specifications and requirements relating to the construction, installation, operation, maintenance and control of Licensee's Small Wireless Facilities, appurtenant equipment, structures and utility poles defined in Section One: Definitions, in the designated locations within the Public Rights-of-Way.

Licensee shall not attach, install, maintain or operate any Small Wireless Facility within any Public Right-of-Way without a permit therefore first having been issued by Borough of Tinton Falls.

Therefore, in the event that Licensee desires to construct, attach, install, maintain or operate any additional Small Wireless Facilities, Utility Poles or structures within a Public Right-of-Way that is not defined in Section One: Definitions then such construction, attachment, installation, maintenance or operation first shall be approved by a majority vote of the governing body and permit therefore issued by Borough of Tinton Falls prior to the commencement of such construction, attachment, installation, maintenance or operation of the Small Wireless Facilities, Utility Poles or structures.

(b) **Required Permits.** If the attachment, installation, operation, maintenance or location of any Small Wireless facility by Licensee in any Public Right-of-Way requires any permit, including any Borough of Tinton Falls street opening permit, then Licensee, if required under applicable Borough of Tinton Falls ordinances, shall apply for the appropriate permit with the appropriate municipal official and shall pay the required fee therefore.

(c) **Utilities.** Licensee shall pay for all utilities used (and connections to said utilities) in connection with the installation, operation and maintenance of its Small Wireless Facilities. Licensee agrees to take utility access from the nearest possible connection in order to minimize utilization of the Public Rights-of-Way.

(d) **Maintenance.** In the performance and exercise of its rights and obligations under this Agreement, Licensee, at its sole cost and expense, shall maintain its Small Wireless Facilities, its Utility Poles, its structures and any real property utilized to access any of the foregoing in a safe and satisfactory condition as directed by, and to the satisfaction of, Borough of Tinton Falls, including, but not limited to, removal of any debris generated by Licensee and replacement of any plants, trees or vegetation damaged or destroyed by Licensee. In the event that any of Licensee's Small Wireless Facilities, and appurtenances thereto, its Utility Poles or its structures causes damage to any Public Right-of-Way or interferes with the performance of any of Borough of Tinton Falls' public duties or other uses of the Public Rights-of-Way, Licensee agrees, upon notice from Borough of Tinton Falls, to promptly commence and complete all necessary repairs to cure any such damage at Licensee's sole cost and expense. If Licensee fails to repair the damage after

receiving notice from Borough of Tinton Falls or if an emergency necessitates immediate repair of the damage, then Borough of Tinton Falls, in its sole discretion, may perform the repair work itself in which case Licensee shall reimburse Borough of Tinton Falls for the cost of the repair work within thirty (30) days after receiving a statement detailing such costs.

7. **Removal and Relocation.** Within 30 days following written notice from the Borough of Tinton Falls, Licensee, at its own expense, shall temporarily or permanently remove, relocate, change or alter the position of any of its Small Wireless Facilities, Utility Poles or structures if the Borough of Tinton Falls determines that (a) such removal, relocation, change or alteration, is reasonably necessary for the construction, repair, maintenance, or installation of any Borough of Tinton Falls improvement in or upon, the Public Right-of-Way; or (b) because the Small Wireless Facilities, Utility Poles or structures are interfering with or adversely affecting proper operation of street lighting, traffic signaling or other poles; or (c) the widening of the Public Right-of-Way necessitates such removal, relocation, change or alteration. In such instance, the Borough of Tinton Falls shall cooperate with Licensee to find a replacement location for its Small Wireless Facilities that will provide similar radio frequency coverage as is provided by the Small Wireless facilities to be removed or relocated. Once the emergency condition no longer exists Licensee shall apply for any permit for the work that was performed during the emergency that it would have had to secure for said work prior to performing said work in the absence of the emergency.

8. **Emergent Conditions.** Licensee shall maintain all of its Small Wireless facilities, Utility Poles and structures at Licensee's sole cost and expense. The noncompliance with normally required procedures for securing a required permit shall be excused when Licensee reasonably determines that an emergency exists. If an emergency creates a hazard on the traveled portion of the Public Right-of-Way, then Licensee shall take immediate steps to provide all necessary protection for traffic on the roadway including the use of signs, lights, barricades or flaggers. Licensee shall, as soon as practical, notify the Borough of Tinton Falls' Engineer, Construction official, or their designees, and the Borough of Tinton Falls Police Department, of the emergency,

informing them as to what steps have been taken for protection of the traveling public and what will be required to make the necessary repairs. On nights and weekends the Licensee shall notify the Borough of Tinton Falls Police Department of an emergency if the Borough of Tinton Falls Engineer and Construction official are unavailable. If the nature of the emergency is such as to interfere with the free movement of traffic, the Borough of Tinton Falls Police Department shall be notified immediately, prior to any other action being taken. To the extent that the Borough of Tinton Falls has actual knowledge of the displacement or damage to any of Licensee's Small Wireless Facilities, Utility Poles or structures, it shall inform Licensee upon learning of the same.

9. **Personal Property Owned by Licensee.** All Small Wireless Facilities, Utility Poles and structures covered under this Agreement shall be considered personal property and shall remain the property of and shall be under the dominion and control of the Licensee. Such personal property may not be utilized by any third party without the express prior written consent of Licensee, but Licensee, upon the request of Borough of Tinton Falls and at no cost to Licensee, shall cooperate with any third party in collocating the third party's equipment upon any Utility Pole or structure upon which Licensee has installed any Small Wireless facility.

10. **Insurance and Indemnity.**

(a) Licensee shall secure and maintain commercial general liability insurance with limits of \$4,000,000 per occurrence for bodily injury (including death) and property damage and \$4,000,000 general aggregate including personal and advertising injury, and including the Borough of Tinton Falls as an additional insured as their interest may appear under this Agreement included insured on the policies. Borough of Tinton Falls' included insured status shall (i) not extend to claims for punitive or exemplary damages arising out of the acts or omissions of Borough of Tinton Falls, its employees, agents or independent contractors or where such coverage is prohibited by law or to claims arising out of the gross negligence of Borough of Tinton Falls, its employees, agents or independent contractors; and, (iii) not exceed Licensee's indemnification obligation under this



Agreement, if any. Notwithstanding the forgoing, Licensee may, in its sole discretion, self-insure any of the required insurance under the same terms as required by this Agreement. In the event Licensee elects to self-insure its obligation under this Agreement to include Borough of Tinton Falls as an additional insured, the following conditions apply:

(i) Borough of Tinton Falls shall promptly and no later than thirty (30) days after notice thereof provide Licensee with written notice of any claim, demand, lawsuit, or the like for which it seeks coverage pursuant to this Section and provide Licensee with copies of any demands, notices, summonses, or legal papers received in connection with such claim, demand, lawsuit, or the like; (ii) Borough of Tinton Falls shall not settle any such claim, demand, lawsuit, or the like without the prior written consent of Licensee; and (iii) Borough of Tinton Falls shall fully cooperate with Licensee in the defense of the claim, demand, lawsuit, or the like. If Licensee elects to self-insure then it or its affiliated parent shall maintain a financial net worth of at least \$100,000,000 and it or its affiliated parent shall provide Borough of Tinton Falls with a certificate of self-insurance along with a copy of its or its affiliated parent's latest financial statement (or a link to an internet web site from which Borough of Tinton Falls may print a copy of the financial statement) showing a net worth of not less than \$100,000,000 as sufficient evidence to demonstrate its or its affiliated parent's financial ability to self-insure the insurance coverage and limits that are specified in this paragraph 10(a).

(b) Certificates of the insurance required by this paragraph 10, along with the evidence of financial ability to self-insure as described in paragraph (a) above, if

applicable, shall be provided to Borough of Tinton Falls within ten (10) days following the effective date of this Agreement and prior to obtaining any permits required under paragraph 6(b). Thereafter, and so long as this Agreement remains executory, Licensee shall provide certificates of insurance or of self- insurance reflecting the requirements of this paragraph to Borough of Tinton Falls within ten (10) days following receipt of a written request from Borough of Tinton Falls. Production of a certificate of self-insurance always shall be accompanied by the evidence of ability to self-insure that is described in paragraph 10(a) above. Upon receipt of notice from its insurer(s) Licensee shall provide the Borough of Tinton Falls thirty (30) days' prior written notice of cancellation of any required coverage.

(c) Licensee agrees to indemnify and hold harmless Borough of Tinton Falls against any claim of liability or loss from personal injury or property damage to the extent directly resulting from or arising out of the negligence or willful misconduct of the Licensee, its employees, contractors or agents, except to the extent such claims or damage may be due to or caused by the negligence or willful misconduct of Borough of Tinton Falls, or its employees, contractors or agents. Borough of Tinton Falls will provide the Licensee with prompt, written notice of any claim covered by this indemnification and hold harmless provision; provided that any failure of Borough of Tinton Falls to provide any such notice, or to provide it promptly, shall not relieve the Licensee from its indemnification and hold harmless obligation in respect of such claim, except to the extent the Licensee can establish actual prejudice and direct damages as a result thereof. Borough of Tinton Falls shall cooperate with the Licensee in connection with the Licensee's defense of such claim. The Licensee shall defend Borough of Tinton Falls, at Borough of Tinton Falls' request, against any claim with counsel of Borough of Tinton Falls' choosing that is reasonably satisfactory to the

Licensee.

(d) The legal liability of the Licensee to Borough of Tinton Falls and any person for any of the matters that are the subject of the insurance policies required by this paragraph shall not be limited by such insurance policies or by the recovery of any amounts thereunder, however neither Borough of Tinton Falls nor the Licensee shall be liable to the other for consequential, incidental, exemplary or punitive damages on account of any activity pursuant to this Agreement.

11. **No Waiver of Breach of Remedies.** No waiver by a Party of any breach of this Agreement or of any representation hereunder by the other Party shall be deemed to be a waiver of any other breach by the other Party (whether preceding or succeeding and whether or not of the same or similar nature), and no acceptance of performance by a Party after any breach by the other Party shall be deemed to be a waiver of any breach of this Agreement or of any representation hereunder by the other Party whether or not the first Party knows of such breach at the time it accepts such performance. No failure or delay by a Party to exercise any right it may have by reason of the default of the other Party shall operate as a waiver of default or modification of this Agreement or shall prevent the exercise of any right by the first Party while the other Party continues to be so in default. Any remedy that either Party may have by reason of a breach of any provision of this Agreement by the other Party at all times shall be preserved and may not be waived.

12. **Severability.** If any provision of this Agreement or the application thereof shall, for any reason and to any extent, be invalid or unenforceable, neither the remainder of this Agreement nor the application of the provision to other persons, entities or circumstances shall be affected thereby, but instead shall be enforced to the maximum extent permitted by law.

13. **Governing Law.** This Agreement shall be governed, construed and interpreted by, through and under the laws of the State of New Jersey without reference to conflict of law principles, except in such instances when the laws of the United States preempt the

laws of the State of New Jersey and all actions, suits and litigation arising under the terms of this Agreement shall be litigated in the Superior Court of New Jersey, County of Monmouth, or in the United States District Court for the District of New Jersey.

14. **Entire Agreement.** This Agreement contains the entire understanding between the parties, and such understanding may not be modified or terminated except in writing and signed by all parties to this Agreement.

15. **Notice.** Any notice required or permitted under this Agreement or under state or federal law shall be deemed sufficiently given or served if sent by United States certified mail, return receipt requested or by a nationally-recognized overnight delivery service. Borough of Tinton Falls and Licensee may change the address required for service of any notice by providing the other party to this Agreement with a new address for sending and receiving of required notices under this Agreement. No notice required under this Agreement may be served validly by email. All notices to Borough of Tinton Falls or Licensee shall be delivered to the following addresses:

Borough of Tinton Falls:      Borough of Tinton Falls Clerk  
556 Tinton Avenue  
Tinton Falls, NJ 07724

Licensee:                              New York SMSA Limited Partnership d/b/a Verizon Wireless  
Attn.: Network Real Estate  
180 Washington Valley Road  
Bedminster, NJ 07921

With a copy to:                      Basking Ridge Mail Hub  
Attn: Legal Intake  
One Verizon Way  
Basking Ridge, NJ 07920

16. **Emergency Contact Information for Licensee.** The emergency telephone contact number to reach Licensee 24 hours per day, seven days per week, is: 800-264-6620. Should that number be disabled or revised for any reason, Licensee shall give Borough of Tinton Falls immediate notice of an alternate emergency contact telephone number. Additionally, Licensee may be reached during business hours as follows:

17. **Assignment.** Licensee may sell, assign or transfer this Agreement without the need for any approval or consent of Borough of Tinton Falls to Licensee's principal, affiliates, subsidiaries of its principal or to any entity which acquires all or substantially all of Licensee's assets in the market defined by the Federal Communications Commission in which Borough of Tinton Falls is located by reason of a merger, acquisition or other business reorganization. Except as provided in the previous sentence, Licensee may not assign this Agreement without the prior express written consent of Borough of Tinton Falls, which consent shall not be unreasonably withheld, conditioned, or delayed after written notice to Borough of Tinton Falls of the request. The terms and conditions herein contained shall be binding upon and inure to the benefit of the permitted successors and assigns of the Parties hereto.

18. **Miscellaneous.**

- a. This Agreement shall be binding upon and shall inure to the benefit of the Parties hereto and all those who succeed to their rights and responsibilities, including their respective successors in interest.
- b. The headings contained in this Agreement are for reference purposes only and shall not affect the meaning or interpretation of this Agreement and shall not be deemed to explain, modify, amplify or otherwise alter the substance of this Agreement.
- c. Borough of Tinton Falls and Licensee each acknowledge that they have had adequate opportunity to review the contents of this Agreement with legal counsel and have executed this Agreement with full and complete understanding of its terms.
- d. This Agreement (and all exhibits thereto) is deemed to have been jointly prepared by the Parties hereto, and any uncertainty or ambiguity existing herein, if any, shall not be interpreted against any Party, but shall be interpreted according to the application of the rules of interpretation for arm's-length agreements.

19. **Execution.** Each Party represents and warrants that it has the full right, power, legal capacity, and authority to enter into and perform its respective obligations under this Agreement. This Agreement may be executed in one or more counterparts, each of which should be deemed an original, but which together shall constitute one and the same instrument.

**IN WITNESS WHEREOF**, and in order to bind themselves to the terms and conditions of this Agreement, the Parties have caused this Agreement to be executed by their proper corporate officers and their corporate seals have been affixed hereto on the date first set forth above.

WITNESS:

Borough of Tinton Falls

\_\_\_\_\_  
, Clerk

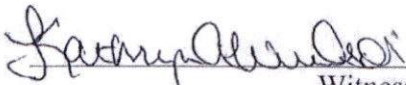
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, Mayor

Date:

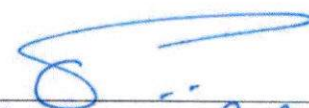
Date:

WITNESS:

Licensee:  
New York SMSA Limited Partnership d/b/a  
Verizon Wireless  
By Cellco Partnership, Its General Partner

  
\_\_\_\_\_  
Witness  
Kathryn A. Windsor

Date: 08/13/2005

  
\_\_\_\_\_  
By: Teddy Poppe  
Name:  
Title: Sr Director

